

REMARKS

Claims 1, 4-9, 11, 12, 14-22, and 25-31 are pending in this application. Claims 1, 4-9, 11, 12, 14-22, and 25 were rejected under 35 U.S.C. §103(a). Claims 26-31 were rejected under 35 U.S.C. §103(a). Based on the foregoing amendments, and the following remarks, Applicants hereby respectfully request allowance of claims 1, 4-9, 11, 12, 14-22, and 25-31 pending in the application.

In response to the last Office Action, Applicants filed a first declaration and made some minor claim amendments. These amendments were not substantial amendments that would require a new search. The Examiner in a telephone call on June 12, 2008 (see below for more details) offered to allow the case if we would be willing to amend the claims to incorporate sweetener, antimicrobial, and dairy protein. She indicated that she believed that the amendments were necessary since these were used in our compositions included in our declaration. After reviewing the case, Applicants agreed to amend the claims to require the dairy protein (as we have now done in the present amendment) but believed the limitation on a sweetener and antimicrobial would unduly limit the claims. The Examiner agreed to consider this approach. In our next communication, the Examiner indicated she had performed another search and would be issuing an Office Action based on new prior art. Apparently this new search was carried out, not because of any amendment made by the Applicants, but because the Applicants refused to accept all amendments suggested by the Examiner. Therefore, a final rejection does not seem warranted and certainly a new search does not seem warranted. Applicants respectfully request that the finality of the last Office Action be withdrawn.

After entry of the present response, Applicants have tested comparative examples based on four different references that the Examiner identified; all had failing results. The Examiner could, of course, perform another search to locate new prior art; we could then provide more comparative examples. This could continue indefinitely. Applicants respectfully suggest that this case is in condition for allowance now and respectfully request such allowance at this time.

I. Summary of Telephone Call with the Examiner on June 12, 2008

Examiner Paden called on June 12, 2008 and indicated she would like the independent claims modified as indicated below. She suggested that if each independent claim was amended to include dairy protein, sweetener, and antimicrobial, the claim would appear allowable. She noted that all comparative examples included in the first declaration contained the ingredients

suggested for addition. Of the ingredients suggested for addition, all except antimicrobial were included in at least one dependent claim. Upon consideration, Applicants did not agree to the suggested amendments as regarding the sweetener and antimicrobial as their inclusion in the claims would needlessly have limited the claims.

After the interview, the Examiner conducted a new search and presented the rejections that follow. Apparently, the earlier rejections were withdrawn.

II. Claim Rejections under 35 U.S.C. §103

Claims 1, 4-9, 11, 12, 14-22, and 25 have been rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent 2,968,628 issued to Reed (hereinafter “Reed”) as further referenced by Joslyn and in view of in view of U.S. Patent 5,490,999 issued to Villagran (hereinafter “Villagran”). These references do not seem to be significantly better (if at all better) than the earlier references. They are just different. As noted above, this process of the Examiner offering new prior art, Applicants offering comparative examples, and the Examiner initiating new searching could continue indefinitely. Applicants respectfully request that this not occur.

Claims 26-31 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Reed as further evidenced by Joslyn and in view of Villagran and further in view of a Food Engineering Article (hereinafter “Article”).

A. Rejection of Claims 1, 4-9, 11, 12, 14-22, and 25

Claims 1, 4-9, 11, 12, 14-22, and 25 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Reed as further evidenced by Joslyn and further in view of Villagran. Applicants respectfully traverse the rejection because Reed, Villagran, and Joslyn do not disclose or suggest each and every limitation of the rejected claims as written or amended.

Reed provides a propellant composition suitable for use in aqueous systems, and especially suitable for use in water systems where it is in contact with water for appreciable periods of time. (Col. 1, line 72 to col. 2, line 3). At example 8, Reed discloses a peanut spread formulation where simply a homogenized peanut butter and peanut oil composition are mixed with the propellant of Reed; no further information or detail is provided about this peanut spread-propellant formulation, whether it has peanut butter qualities and whether or not it is stable.

The secondary reference cited by the Examiner, Villagran, provides a process for preparing a nut spread by controlling the order of addition of the ingredients. (Col. 2, lines 20-24). The nut spread disclosed is for a high protein, low fat product. The product or nut spread

disclosed comprises nuts that are ground into a paste with added protein and non-protein containing solids. Additionally sugars, stabilizers/emulsifiers and other flavorings can be added. In example 1 of Villagran, peanuts are combined with molasses, sugar, salt, a stabilizer, emulsifier, soy protein isolate, corn syrup solids, and vitamins and minerals.

The Examiner simply states that it would have been obvious to one of ordinary skill in the art to utilize the peanut butter of Villagran in the pressurized container of Reed.

Applicants respectfully disagree. Applicants conducted a series of experiments to test this assertion. As shown, combining the two references in the manner suggested by the Examiner provided a product that was not stable and that leaked out of the can. (*See* Second Declaration of Carrie M. Kincaid). In Applicants' experiment, a peanut butter sample using the peanut butter disclosed per the Villagran patent was stored in a pressurized can using the formulation disclosed in Reed. Since the can currently used has a separate pressurized air chamber where the propellant does not interact with the product, the formulation of Reed was adjusted for removing its propellant from the formula. This resulted in about 88.9% peanut butter and 11.1% oil, thus maintaining the same ratios of peanut butter and peanut oil as if the propellant had been used. Upon using the Villagran peanut butter at 88.9% and adding 11.1% peanut oil as per Reed and subsequently storing in a pressurized can, it was found that this created a very unstable product that exhibited oil separation and leakage from the can after only a short storage period. Oil separation was also evidenced when the spread was discharged from the can after 21 days of storage.

The Examiner also states at page 4 of the OA that it would be obvious to substitute dairy protein for soy protein isolate, since Villagran discusses other alternative emulsifiers. Regardless of whether or not it would be obvious, the use of a dairy protein in place of the soy protein isolate still does not correct the other deficiencies, such as the other component amounts being different, the combination of Villagran and Reed yielding an unstable product, etc.

The Examiner further states at page 3 of the OA that water would be an expected ingredient of molasses and corn syrup solids found in the Villagran patent. However, when the water contribution from all of the components in Example 1 of the Villagran patent are calculated, the highest moisture that could be present is only about 3.5%; whereas the moisture range of the claimed invention ranges from about 10 to about 60% water. (*See* Second

Declaration of Carrie M. Kincaid, paragraph 18). Thus, the Villagran patent does not come close to the moisture levels claimed in the claimed invention.

The Joslyn reference was cited by the Examiner only to show typical densities of various food products. Seeing how the composition amounts differ between Villagran and the claimed invention (*i.e.*, the amounts of water are very different) it would not be expected that the peanut butter product of Villagran would have the same density as the claimed invention. Indeed, comparative examples present in the Second Declaration show that this prior art combination does not provide a successful product regardless of the density. Reed and/or Villagran combined with Joslyn cannot render the present invention obvious.

Thus, Applicants respectfully submit that claims 1, 4-9, 11, 12, 14-22, and 25 are not rendered obvious over Reed alone or in combination with Joslyn and Villagran. Applicants respectfully request that this rejection be withdrawn.

B. Rejection of Claims 26-31

Claims 26-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reed as further evidenced by Joslyn and Villagran and further in view of the Article. The arguments above regarding Reed, Joslyn, and Villagran are hereby incorporated by reference. The Article does not correct these and other deficiencies in Reed, Joslyn and/or Villagran to make Applicants' invention obvious. Applicants respectfully traverse this rejection for the reasons stated herein.

The Food Engineering article is related to a pressurized container and does not correct any of the deficiencies discussed above. Thus, Applicants respectfully submit that claims 26-31 are not rendered obvious over Reed alone or in combination with Joslyn, Villagran and/or the Article. Applicants respectfully request that this rejection be withdrawn.

III. Experimental Test Results

Applicants have carried out comparative experiments using the teachings of the primary references (*i.e.*, Reed and Villagran) to show that their efforts did not produce a suitable peanut butter product. Thus, these experiments further affirm and support the non-obviousness of the present claims. These experiments are attached to the Second Declaration of Carrie M. Kincaid who organized and supervised the experiments described therein. As was done previously, Applicants will supply the Examiner with a copy of the Declaration and the supporting exhibits in a PDF version so that color copies of the exhibits can be included in the file, if desired.

As detailed in the attached Second Declaration of Carrie M. Kincaid, peanut butter products were prepared using the teaching of Reed and/or Villagran and compared to the inventive peanut product containing 40 percent peanut butter. As the amount of peanut butter in the product increases, it becomes more and more difficult to prepare acceptable aerosol dischargeable peanut butter products that, when discharged, do not show oil separation and maintain the texture, appearance, and other organoleptic properties normally associated with conventional peanut butter. That the inventive peanut butter product was clearly superior to either the Reed or Villagran formulations, alone or when combined, clearly demonstrates the non-obviousness of the present invention. The comparative products were not stable, were not resistant to oil separation when stored in pressurized containers, and did not provide a conventional peanut butter product when dispensed. The inventive products, on the other hand, were stable, were resistant to oil separation when stored in pressurized containers, and did provide a peanut butter that, when dispensed, closely resembled traditional high quality peanut butter products commercially and currently available in non-pressurized containers, even at the higher peanut butter levels.

During testing, a sample was viewed as having a passing result if the following criteria was met: (1) the dispensed product closely resembled a traditional peanut butter product; (2) there was no oil separation upon discharge from the pressurized can; and (3) there was no oil or product leaking out of the can nozzle. Traditionally, peanut butter is a much harder product to keep stable.

The Reed comparative products (*i.e.*, Experiment #1) were prepared using the ingredients as outlined in Example 8 of the Reed patent, with the exception of the propellants. The octafluorocyclobutane and isobutane were not included in the product makeup as an aerosol propellant, since Applicants utilize a separate pressurized air chamber where the propellant does not interact with or contact the product. Therefore, the ingredient amounts tested were adjusted in order to maintain the same ratios of peanut butter to oil; thus, the peanut butter was included at about 88.9% and the peanut oil was in the amount of about 11.1%. The Attachment to the Second Declaration outlines the ingredients and amounts used in preparing the Reed comparative products.

The Villagran comparative samples were prepared using JIF® brand reduced fat peanut butter, since the Applicants believe the peanut spread disclosed in Example 1 of Villagran covers

or is similar to the formulation for JIF® reduced fat peanut butter based on the ingredient label for that product. See Applicants' comparison of the ingredients of both the patent and the label at paragraphs 7 and 8 of the Second Declaration of Carrie M. Kincaid filed herewith. A first peanut butter sample (Experiment #2) was prepared utilizing the ingredients of Reed and Villagran combined; thus, 88.9% JIF® reduced fat peanut butter was combined with 11.1% peanut oil. The second sample (Experiment #3) was made utilizing 100% JIF® reduced fat peanut butter as per the Villagran patent alone. The Attachment to the Second Declaration of Carrie M. Kincaid outlines the ingredients and amounts used in preparing the Villagran comparative products.

Applicants' samples were prepared as outlined in Example 1 of its specification except that sodium alginate, titanium dioxide slurry, polysorbate 60, caramel color, and peanut flavor were not utilized. These ingredients were excluded since the Examiner earlier required that all ingredients included in our first declaration be included in the independent claims. The edible oil was approximately 3%, water was about 40%, milk protein concentrate was used at about 10%, whey protein concentrate was at about 7.28%, emulsifier (*i.e.*, panodan) was about 0.2%, and the peanut butter was prepared at 40%; all within Applicants' claimed ranges (*i.e.*, 0.5-10% edible oil, 10-60% water, 1-20% dairy protein concentrate, and 10-45% peanut butter). The Attachment to the Second Declaration outlines the ingredients and amounts used in preparing Applicants' sample products. The method in Example 1 of Applicants' specification was followed in preparing these experimental samples.

All of the comparative samples had visible oil separation upon storage and when dispensed. (*See* Attachment to the Second Declaration of Carrie M. Kincaid). The samples further exhibited both product and oil leaking from the can. Thus, the comparative samples were not stable upon storage.

In comparison, Applicants' inventive formula at 40% peanut butter was very stable, with no leakage and no oil separation visible. (*See* Attachment to the Second Declaration of Carrie M. Kincaid). Therefore, every comparative sample (*i.e.*, Reed and Villagran samples) exhibited product and oil leakage and/or clear oil separation upon dispensing; all comparative examples were considered failures.

Furthermore, Applicants' inventive sample was the only one of all the experimental samples that actually looked like traditional peanut butter when dispensed. Appearance is a key

factor to consumer acceptance. Additionally, Applicants' inventive sample was the only one that was stable in the pressurized can during storage for up to 21 days. The Reed and Villagran samples all leaked both peanut butter and oil and had considerable oil separation of the peanut butter product.

Overall the Reed and Villagran samples were considerably less stable than Applicants' inventive product. They had an unacceptable consistency and appearance in the dispensed products and showed oil separation. None of these comparative products would be acceptable to a consumer looking for a "real peanut butter" aerosol product.

The Applicants have found a unique combination of peanut butter, oil and other components to deliver a texture and appearance that is very similar to commercial peanut butter, and has little or no oil separation while stored under pressure. Both of these factors are very important to marketing such a product to consumers.

The present comparative examples clearly demonstrate that the Reed and Villagran procedures could not produce acceptable dischargeable peanut butter products, either alone or when combined. Applicants have now produced comparative examples for two sets of references showing that the art cited by the Examiner did not produce the inventive product.

CONCLUSION

In view of the foregoing, Applicants submit that claims 1, 4-9, 11, 12, 14-22, and 25-31 are patentable over the cited references and hereby respectfully request reconsideration and allowance of claims 1, 4-9, 11, 12, 14-22, and 25-31.

The Commissioner is hereby authorized to charge any additional fees which may be required in this application to Deposit Account No. 06-1135.

Respectfully submitted,

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